FILED BY CLERK
NOV 17 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LETICIA VILLAREAL GARCIA, Appellant.	)	2 CA-CR 2007-0036 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500150

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Joy Bertrand
Scottsdale
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Following a jury trial, appellant Leticia Garcia was convicted of transportation of marijuana for sale, having a weight of more than two pounds. The trial court sentenced her to a mitigated, minimum prison term of three years. On appeal, Garcia argues the trial court erred by: 1) not ordering the state to release the identity of a confidential informant; 2) permitting the state to introduce drug courier profile evidence at trial; 3) denying her motion for a mistrial based on prosecutorial misconduct; and 4) denying her motion for new trial, which alleged she had been selectively prosecuted on the basis of her "residency and nationality," in violation of the United States and Arizona Constitutions. For the following reasons, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On February 12, 2005, Arizona Department of Public Safety (DPS) Officer Daniel Long received information that a blue Grand Marquis containing "a trunk load of marijuana" was traveling toward Bisbee from Douglas, Arizona. Long was instructed to locate the vehicle and develop independent reasonable suspicion to stop it. He located the vehicle and noticed its windows appeared to be tinted "darker than the law allows." He followed the vehicle and observed it enter a painted median area well before the left turn bay and turn onto State Route 90. As the vehicle went around a curve, its left tires crossed the double center lines "for a distance" and

then returned to the appropriate lane. Long then activated his emergency lights, and the driver, Garcia, pulled over.

¶3 When Long asked for her license and proof of insurance, he noticed that she appeared to be nervous. Additional officers arrived, and one indicated that he could smell marijuana near the trunk area of the car. After confirming that the driver's side window was illegally tinted, Long asked Garcia to get out of the car. When asked, Garcia denied knowing whether there was any contraband in the car and consented to a search. The officers found ten bundles of marijuana in the trunk, weighing 214 pounds. Garcia was then arrested and given the *Miranda*[1] warnings, and Long issued her a repair order for the window tinting and written warnings for the traffic violations.

¶4 After a jury trial, Garcia was convicted of transporting more than two pounds of marijuana for sale and was sentenced as noted above. This appeal followed. We have jurisdiction under A.R.S. § 13-4033(A).

Discussion

I. Disclosure of Informant's Identity

¶5 Garcia first argues the trial court abused its discretion by denying her motion to compel disclosure of the identity of the confidential informant who had provided information about the marijuana in her car. She contends the informant might have provided

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

exculpatory evidence because the information suggested the informant had been present when the vehicle was loaded, and, therefore, the informant "likely also had information regarding [Garcia's] presence when the car was loaded[, and] . . . could have clarified whether or not [she] could have known about the marijuana." We review the trial court's ruling on a motion to compel disclosure of an informant's identity for an abuse of discretion. *State v. Tuell*, 112 Ariz. 340, 342-43, 541 P.2d 1142, 1143-44 (1975).

¶6 Generally the state may withhold the identity of confidential informants. *State v. Superior Court*, 147 Ariz. 615, 616, 712 P.2d 462, 463 (App. 1985). However, if "disclosure of the name is necessary or desirable to show the defendant's innocence or . . . nondisclosure would deprive [the] defendant of a fair trial then the privilege must give way." *State v. Benge*, 110 Ariz. 473, 477, 520 P.2d 843, 847 (1974). It is the defendant's burden "to establish that the informant could testify on the merits of the case." *State v. Robles*, 182 Ariz. 268, 271, 895 P.2d 1031, 1034 (App. 1995).

¶7 Garcia argues the informant could have corroborated her claim that she did not know there was marijuana in her car because he was present when it was loaded and could testify that she was not. But even assuming the informant could confirm Garcia was not present during the loading of the marijuana, this would not also necessarily establish she was otherwise unaware the marijuana had been placed in the trunk of her car. Any suggestion the informant could have provided information relating to Garcia's general knowledge that the marijuana was present in her vehicle was mere speculation. *See State v. Grounds*, 128

Ariz. 14, 15, 623 P.2d 803, 804 (1981) (each side must present evidence supporting its allegations; argument of counsel not evidence); *State ex rel. Berger v. Superior Court*, 21 Ariz. App. 170, 172, 517 P.2d 523, 525 (1974) ("A mere possibility or speculative hope that an informant might have other information which might be helpful to the defendant is insufficient" to compel disclosure.).

¶8 In any event, based on the limited information Garcia asserted the informant could provide, any error in failing to disclose the informant's identity would have been harmless. *See State v. Gaines*, 188 Ariz. 511, 514-15, 937 P.2d 701, 704-05 (App. 1997) ("Absent . . . structural defects, this court will not reverse a criminal conviction based on an erroneous ruling by the trial court . . . if we can say, beyond a reasonable doubt, that the error did not affect the verdict."); *see also State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Garcia was arrested while driving with a large quantity of marijuana in a vehicle she owned, and she told the arresting officer "she knew that [the traffic violations] weren't the reason that [the officers] pulled her over, that somebody must have told [them] because she ha[d] been to Tucson several times, and nobody stopped her for window tint." These facts constituted strong evidence that Garcia was aware there was marijuana in her car. *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, ¶ 25, 993 P.2d 1043, 1048 (App. 1999); *see also State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (jury may infer driver's knowing possession where vehicle contained marijuana). Therefore, even assuming the informant could have testified Garcia was not present when the vehicle

was loaded, we can say, beyond a reasonable doubt, such testimony would not have affected the jury's verdict. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191; *Gaines*, 188 Ariz. at 514-15, 937 P.2d at 704-05.

II. Admission of Drug Courier Profile Evidence

¶9 Garcia next asserts the trial court abused its discretion by permitting the admission of drug courier profile evidence, over her objection, in violation of *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998).[2] We review a trial court's admission of evidence for an abuse of discretion. *State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008).

¶10 Garcia contends statements made by two of the arresting officers during trial and a substantial portion of the testimony of a third officer, Thad Smith, who had not been part of the investigation, constituted impermissible drug courier profile evidence that was used as substantive evidence of her guilt. The testimony consisted of the officers' explanation for why fingerprint analysis of the marijuana packaging was not conducted in

[2]The state argues Garcia has forfeited this claim for lack of sufficient argument in her appellate brief. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). In her opening brief, counsel has provided an extensive statement of facts, which includes a general description of the relevant testimony; however, she does not refer to these facts with any specificity or cite to the relevant parts of the record in her argument on this issue. In response to the state's assertion, she refers this court back to the citations to the record included in her statement of facts. However, it is not this court's responsibility to determine which facts are relevant to a particular argument, and we will not search an expansive statement of facts to find those which may arguably support the claim being made. Nonetheless, in our discretion, we decline to find the argument forfeited, but we confine our review to the issues and facts raised in her opening brief. We therefore will not consider the impact of closing arguments on this issue because that argument was raised for the first time in her reply brief. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005).

this case and a description of the usual process for how "load cars," vehicles in which large amounts of marijuana are hidden, are loaded with the drug. The trial court characterized this evidence as proper rebuttal to Garcia's argument that the state's investigation had been incomplete.

¶11 Drug courier profile evidence generally consists of "a loose assortment of general . . . characteristics and behaviors used by police officers to explain their reasons for stopping and questioning persons about possible illegal drug activity." *Lee*, 191 Ariz. 542, ¶ 10, 959 P.2d at 801. Although such evidence is inadmissible as substantive evidence of guilt, it may be admitted for a proper purpose, including rebutting a defense argument of innocence based on particular profile characteristics. *Id.* ¶ 11.

¶12 The evidence found to be drug courier profile evidence in *Lee* included the officer's explicit comparison of the defendant's specific behaviors—arriving late for the last flight to a known drug destination city and carrying a hard-sided plastic suitcase—with that of known drug couriers. The officer cited the courier profile to explain why she found the defendant's behavior suspicious. 191 Ariz. 542, ¶ 13, 959 P.2d at 802. However, in *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997), cited with approval in *Lee*, the Ninth Circuit Court of Appeals found general testimony that "drug traffickers do not entrust large quantities of drugs to unknowing transporters" did not constitute drug courier profile evidence because it was not admitted to show "Cordoba was guilty because he fit the

characteristics of a certain drug courier profile." *See Lee*, 191 Ariz. 542, ¶ 11, 969 P.2d at 802.

¶13 The evidence in this case is more consistent with that presented in *Cordoba* than *Lee*. Here, all three officers testified no fingerprint testing had been conducted because they generally do not find a load car driver's fingerprints on marijuana hidden in a vehicle. And Detective Smith specifically testified that load car drivers are not usually present when their vehicles are loaded. Unlike *Lee*, this evidence did not identify characteristics or behaviors that made Garcia appear to be more or less like a drug courier. Rather, as in *Cordoba*, the evidence was general and directed at the drug trafficking process rather than an individual's behavior. Thus, we agree with the state that the testimony in this case did not constitute drug courier profile evidence.

¶14 Furthermore, even assuming the evidence constituted drug courier profile evidence, it was admitted for a proper purpose and not as substantive evidence of guilt. *See Lee*, 191 Ariz. 542, ¶ 11, 969 P.2d at 802. The testimony concerning the officers' decision not to test for fingerprints specifically rebutted Garcia's claim that the police investigation had been incomplete. And Smith's testimony that load car drivers are not generally present when the vehicle is loaded explained the basic modus operandi of drug organizations to the jury, which might not have been familiar with how such organizations work. Thus, it provided context for the claim Garcia subsequently made that because she had not been present when the vehicle was loaded, she must be found not guilty. These are all proper

purposes under *Lee*. *Id.* (permissible purposes of profile evidence include rebutting claim of innocence based on profile characteristics and explaining modus operandi of trafficking organizations); *see also Cordoba*, 104 F.3d at 230 (modus operandi); *United States v. Beltran-Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989) (rebuttal of claim of innocence). Thus, the trial court did not abuse its discretion by admitting this testimony.[3]

III. Prosecutorial Misconduct

¶15 Garcia next alleges three instances of prosecutorial misconduct during closing argument that she contends require reversal. To warrant reversal on the basis of prosecutorial misconduct, a "'defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . [T]he conduct [must] be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d 368, 403 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Garcia does not appear to be arguing that any single comment constituted reversible misconduct, but that "the totality of the prosecutor's comments" cumulatively "resulted in an unfair

[3]Moreover, any error in the introduction of this evidence would have been harmless. The trial court specifically instructed the jury that the "evidence was not offered, and may not be considered, to show that [Garcia] acted like any . . . other persons and is therefore likely to be guilty," and there was substantial evidence of her guilt, particularly the inculpatory statements made at the time of her arrest. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (jurors presumed to follow court's instructions).

trial." *See id*. ¶ 155. We first address the individual assignments of error and then assess their cumulative effect on the trial. *Id.*

A. "Golden Rule" Evidence

¶16 Garcia first contends it was improper for the prosecutor to tell the jury: "You would know if marijuana was in the trunk of your car." Although the trial court concluded this was "the most serious of the improper comments by the prosecutor," it found Garcia had waived the issue because she did not raise it until her motion for new trial. The state argues Garcia failed to timely raise this objection below, and we must therefore review it for fundamental error only.

¶17 After the prosecutor told the jurors, "You would know if marijuana was in the trunk of your car," he continued without objection:

> The defense suggested that [a witness] must have recognized [a vehicle] as [Garcia]'s car later, that's how he put two and two together. Later the defendant testified ["]no, I never got my car back.["] How did [the witness] recognize[] it later when she never got the car back?

Defense counsel then objected, saying, "I never made that argument. I referred to Exhibit[s] M and N [showing pictures of Garcia's vehicle]." Thus, it is clear that counsel did not object to the prosecutor's initial comment but rather to his characterization of an inconsistency in a defense witness's testimony. Because Garcia failed to timely raise this issue below, she has forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶18 Fundamental error is that which goes to the foundation of the case, "'takes from the defendant a right essential to his defense, and [is] error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under this standard of review, the defendant must establish that error exists and that it caused him prejudice. *Id.* ¶ 20.

¶19 Garcia argues the prosecutor's suggestion that the jurors would know if marijuana was in their vehicles constituted improper "Golden Rule" evidence, which was prohibited in *Taylor v. DiRico*, 124 Ariz. 513, 518, 606 P.2d 3, 8 (1980). A "Golden Rule" argument is one that invites the jurors to put themselves in the shoes of a party and decide the case on the basis of how they would want the issue resolved, not on the evidence. The state contends that the analysis of "Golden Rule" arguments has not been extended to criminal cases in Arizona and instead characterizes Garcia's argument as "one that alleges the prosecutor improperly appealed to the emotions and passions of the jury." *See Taylor*, 124 Ariz. 531, 517-18, 606 P.2d 3, 7-8 (1980). We fail to see the distinction. But regardless of the label attached to it, any argument "not based on the evidence" is improper. *State v. Mincey*, 130 Ariz. 389, 410, 636 P.2d 637, 658 (1981); *see also State v. Comer*, 165 Ariz. 413, 426-27, 799 P.2d 333, 346-47 (1990).

¶20 The prosecutor's statement invited the jurors to consider their knowledge about the contents of their own car trunks as a basis for determining whether Garcia knew there was marijuana in hers. But regardless of the propriety of the comment, it was made

in passing and does not rise to the level of fundamental error, and, in any event, Garcia has not established any resulting prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

B. Gambling References

¶21 Garcia next argues "the damage from the State's comments about [her] gambling gravely sullied [her] trial, requiring reversal." However she provides no argument or any citation to authority in support of this assertion. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs shall contain argument with citation to authority). She refers only to a post-trial comment by a juror that suggested the jury found evidence that Garcia had a gambling problem particularly persuasive, but she neither identifies why the prosecutor's closing argument concerning evidence of a gambling habit was improper, nor explains why it was improper for the jury to consider such evidence. Because she has utterly failed to support this claim with argument and authority, we find it waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), (e); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (arguments unsupported by authority are waived).

C. Drug Courier Profile Evidence

¶22 Finally, Garcia contends the prosecutor improperly encouraged the jury to apply the drug courier profile evidence beyond the limited purpose for which it was admitted. Specifically, she contends the prosecutor's statements referring to "higher-ups in the drug organization," characterizing load drivers as "small fish" in such organizations, and

speculating about what happens when loads are dropped off at a destination were fundamentally unfair. And she argues the court's limiting instruction relating to this evidence and its admonition to the jury during the state's closing to "disregard those portions of the argument that [it] sustained objections to" were insufficient to cure the error.

¶23 As we have already concluded, the state did not elicit improper drug courier profile evidence. Thus, to the extent the prosecutor made comments suggesting the existence of a drug organization in this case, we agree with the trial court that it was proper argument based on the state's theory that Garcia had been driving a load of marijuana for a drug organization. *See State v. Moody*, 208 Ariz. 424, ¶ 180, 94 P.3d 1119, 1159 (2004) (counsel given wide latitude to comment on evidence and argue all reasonable inferences to jury).

¶24 However, the court sustained Garcia's objections to the prosecutor's comments about "the people back at the stash house" and "on the other end, when the [marijuana is] dropped off." It then admonished the jury to disregard the comments. Additionally, the court instructed the jury on the limited use of the evidence "concerning the behavior of other persons not involved in this case who drove vehicles loaded with marijuana" and that it must not be influenced by sympathy or prejudice and that the attorneys' arguments did not constitute evidence. We presume the jury follows the trial court's instructions, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and Garcia has not provided any evidence to rebut this presumption. Thus, although these comments were arguably improper

and resulted in error, we cannot say they affected the verdict. *See Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d at 403.

¶25 Finally, as noted above, even if the individual errors were harmless, "an incident may nonetheless contribute to a finding of persistent and pervasive misconduct if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct . . . 'with indifference, if not a specific intent, to prejudice the defendant.'" *Id*. ¶ 155, *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192. However, the prosecutor's improper comments in this case were isolated and neither persistent nor pervasive; consequently we cannot say the misconduct "so permeated the entire atmosphere of the trial with unfairness that it denied [Garcia] due process." *Id*. ¶ 165. The incidents of misconduct in this case do not warrant reversal. *Id*.

IV. Selective Prosecution

¶26 Garcia lastly argues the trial court erred in denying her motion to vacate the judgment of guilt pursuant to Rule 24.2, Ariz. R. Crim. P., in which she maintained she had been selectively prosecuted on the basis of her nationality and residency, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Privileges and Immunities Clause of the Arizona Constitution. *See* Ariz. Const. art. 2, § 13. The trial court concluded that Garcia failed to establish a colorable claim of selective prosecution. We agree.

¶27 Garcia's argument was based on a newspaper article published after her trial concerning the prosecution of certain drug smuggling cases.[4] The article reported that a deputy Cochise County prosecutor had indicated the United States Attorney's Office often refers drug smuggling cases to county attorneys' offices for prosecution if the amount of marijuana seized is less than 500 pounds, but that the Cochise County Attorney's Office generally would not accept cases in which the arrest was initiated by a federal officer and the defendant was not a resident of Cochise County. However, he suggested the county might choose to prosecute the case if the defendant is a local resident or county law enforcement initiated the arrest. Garcia contends this policy "is a *per se* violation of the Fourteenth Amendment and requires the reversal of [her] conviction."

¶28 To prevail on a selective prosecution claim, the defendant must demonstrate "other similarly situated people were not charged with the crime [the defendant] is accused of . . . and . . . the decision to charge [the defendant] with that crime was made based on an impermissible ground, like race or religion." *State v. Montano*, 204 Ariz. 413, ¶ 78, 65 P.3d 61, 76 (2003). Garcia has failed to establish either prong of this test.

¶29 According to the policy described in the article, federal referral cases are apparently those in which a federal officer initiates the arrest but are ultimately referred to a state attorney's office for prosecution because they involve less than 500 pounds of

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[4]Jesse Froehling, *Lawmen: Limit put on drug cases*, Sierra Vista Herald, Dec. 23, 2006, *available at* http://www.svherald.com/articles/2006/12/23/local_news/news2.txt.

marijuana. But in this case, although state law enforcement officers initially became suspicious of Garcia because of a tip from a federal officer, the DPS officer developed his own grounds for stopping the vehicle and for probable cause, and DPS independently investigated the case from beginning to end. Garcia's case is therefore not a federal referral case within the ambit of the policy described in the newspaper article. Therefore, Garcia has failed to provide any evidence that other similarly situated defendants—those who are local residents and whose cases were investigated by state law enforcement—have not been prosecuted and that her prosecution was based on an impermissible consideration. *Id.* The trial court did not err in finding Garcia had failed to establish a colorable claim of selective prosecution and in denying her motion to vacate the judgment.

Disposition

¶30 For the reasons stated above, we affirm Garcia's conviction and sentence imposed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge